.STATE OF MICHIGAN

IN THE SUPREME COURT

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

-vs-

HAGGERTY CORRIDOR PARTNERS LIMITED PARTNERSHIP, a Michigan limited partnership, PAUL D. YAGER, Trustee a/k/a PAUL D. YEGER AND NEIL J. SOSIN,

Defendants-Appellants,

_____/

Supreme Court No. 124765

Court of Appeals No. 234099

Oakland County Circuit Court No. 95 509518 CC

DEFENDANTS-APPELLANTS' REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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ARGUMENT

A. MDOT's Factual Recitation Fails To Undercut The Force Of The Property Owner's Position On Appeal.

MDOT argues that the appeal presents a question of law, not fact. (MDOT Brief, p 1). MDOT then criticizes the property owner[1] for "intend[ing] to portray an overwhelming factual case for the imminence and certainty of rezoning." (*Id.*) MDOT asserts that this evidence is not material to the appeal. To the contrary, the limited issues as to which this Court granted leave to appeal[2] require consideration of both the legal question of whether a post-taking zoning decision may ever be admitted into evidence in determining the value of condemned property and the related question of whether the trial court abused its discretion in permitting the evidence to be considered in this case. As a result, the property owner has described the overwhelmingly persuasive evidence presented to the jury to demonstrate that the post-taking zoning evidence was properly admitted as part of the over-all proofs, that the trial court's ruling allowing it into evidence was not an abuse of discretion, and that any error could only have been harmless.

MDOT argued below that there was no possibility of rezoning and that therefore evidence of the post-taking zoning change should be excluded. The issue arose when MDOT moved in limine to strike the property owner's appraiser's testimony and evidence with regard to

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[1]For ease of reference, Haggerty Corridor Partners Limited Partnership, Paul D. Yager, Trustee a/k/a Paul D. Yeger and Neil J. Sosin will be referred to as "the property owner," a reference that will include all defendants. The Michigan Department of Transportation will be referred to as "MDOT."

[2]This Court's order stated as follows:

> On order of the Court, the application for leave to appeal the July 22, 2003 judgment of the Court of Appeals and the motions for miscellaneous relief are considered. The motions for miscellaneous relief are GRANTED. The application for leave to appeal is GRANTED, limited to the issues (1) whether a post-taking zoning decision can be considered in determining value at the time of taking; and (2) whether the Court of Appeals decision in this case is consistent with *MDOT v Van Elslander*, 460 Mich 127 (1999).

the highest and best use and to bar the testimony of a May 1998 zoning change. (MDOT Motion in Limine, 3/6/01). MDOT argued that "there was no tangible evidence that the possibility of rezoning the subject property on the date of acquisition was real enough to have caused a prospective buyer to pay more for the property than the prospective buyer would otherwise have paid." (MDOT Motion, p 12). MDOT's theory at trial was that this absence of "tangible evidence" meant that the highest and best use was not commercial development, but rather residential.

MDOT argued that the City of Novi was not serious about rezoning until some time in 1997, and that the zoning change of 1998 was "not relevant in that it is too far removed from the date of acquisition" to be relevant. (MDOT Motion in Limine to Strike, p 23). MDOT's relevance argument was squarely predicated on its assertion that the zoning change was too remote in time, not that it could never be relevant. (*Id.*, p 24).

The property owner argued that MDOT's valuation theory was, at best, implausible since it was based on the premise that no possibility existed that the property would be rezoned from residential acreage, a classification with all the earmarks of a holding zone, to a commercial zone allowing for office and high-tech developments, a classification that the city had been trying to expand for some years. (Haggerty Corridor Brief in Response to Motion in Limine, 3/13/01, pp 2-23). The property owner also pointed out that its appraisers had evaluated the site under its current zoning and "conclusively determined that development of the site as RA residential was economically unfeasible." (Haggerty Corridor Brief in Response to Motion in Limine, p 3). This meant that the pre-taking restrictive RA zoning could not withstand a legal challenge. As a result, the highest and best use was not, and could not be, residential development. The highest and best use of the property was for the office high tech development, the use to which the city later rezoned the property. (Tr, 4/2/01, pp 114, 166-167; Apx 216a, 229a).

MDOT's criticism of the citations included in the first paragraph of the property owner's brief is not based on a careful reading of the property owner's brief. (MDOT Brief, pp 1-4). The sentences that MDOT quoted do not address the jury view but indicate that the property owner planned to develop an office park on the property, understood that the zoning was likely to be changed to allow for this type of development before it was purchased, and developed an office park on the remainder after the condemnation. The property owner stated:

> After MDOT condemned approximately fifty-one acres, the property owner developed an office park on the remainder, which had been rezoned. These changes to the property's zoning, in fact, occurred as the property owner had anticipated before assembling the property. (Haggerty Corridor Brief, p 1).

In support of its assertion, the property owner cited various witnesses who testified to these facts. MDOT has pointed out several typographical errors in the page references to the appendix. But the testimony referenced supports the point that the property owner was making, which is that the market value of the property on the date of the taking reflected a value based on high-tech office development.

When asked where OST zoning was "today," Christopher Doozen stated, "I think the area that encompasses this property, and I believe there was areas along Twelve Mile Road, as well." (Tr, 4/2/01, Doozen, p 252; Apx 250a). Doozen's answer was allowed into evidence without objection. (*Id.*) Fuller testified:

> [I]n '94, '95, and in 1995 they went before the Planning Commission on June 6th and said, I'd like to talk about OST—or, I'm sorry, OS-3, which was what they were trying to develop at that point in time. Subsequently, OS-3 was thrown out and they went back to work and came up with the product they called OST. (Tr, 4/6/01, Fuller, p 51; Apx 424a).[3]

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[3]This decision did not amount to a rejection of the concept of office high-tech development. Rather, it stemmed from the desire to further study the proposal. As the planning director's comment shows this was part of a lengthy but inexorable progression toward adoption of zoning to permit office high-tech development.

Fuller also said:

> At that same June 3rd—or June 5th, 1995 Planning Commission meeting, Jim Wahl, the planning director for the City, spoke to the Planning Commission and said, we've got to do something—I'm paraphrasing it, I'm not saying it as he said it exactly—but this is important that we implement it, it's been dragging on too long, let's get it done, in 1995. (*Id.*)

Fuller continued:

> In 1996, OST was given a public hearing, in September, and I believe it was adopted in December of 1996, so the zoning district came into play, twelve months after the date of taking for this—of this property, with the awareness of the background. (*Id.*)

Fuller explained:

> I also believe that at one point in time in 1998, when the zoning district was applied to the subject property, that Mr. Wahl or someone else in the Planning Department pointed out they'd been working on this for eight years, which would mean they've been working on it since 1990. (*Id.*)

Neil Sosin's testimony likewise supports the points included in the property owner's brief, although the appendix reference failed to correlate to the page at which his testimony was to be found. Sosin said, "This was the period of time where, as I described before, we did our homework on the property." (Tr, 4/5/01, Sosin, pp 68-70, 96; Apx 356a-357a, 363a). According to Sosin, "We would investigate as to the uses of the property, we would investigate as to the soil conditions, we would look at all of the woodlands and wetlands that may or may not be on the property, we'd look at the topography, et cetera." (*Id.*) He continued:

> And one of the other things we did in the property in particular here was, as Mr. Rogers had described to you earlier in the testimony, Novi had kind of an open door that allowed us to go into the City when we had a parcel and discuss questions with members of the Planning Department, and also with Mr. Rogers, who was the consultant to the Planning Department. (*Id.*)

Sosin described his contacts with city officials and consultants:

> And Mr. Stewart and I went into the City and met with Mr. Rogers, we described that we had developed the Country Club Corporate Park, that we were working on that, we described to him what was going to be happening there, we described to him that Nissan was locating there, that the American Concrete Institute was

> locating there, we described the number of employees and the type of activity that Nissan would be involved in, and we described the high-tech type of zoning that they had in Farmington Hills, and we asked Mr. Rogers whether he felt that we could do that type of program on this property and properties that we would accumulate in the area, and this is on the Haggerty side in Novi, which is, again, just kiddy-corner across the street from our country club development, and Mr. Rogers indicated very favorably to us that he thought that there was a place for this in the city of Novi, and that the site was good for what we were talking about because of some of the ability if we could put together a whole parcel and also because of—. (*Id.*)

Sosin explained that he meant "[a] whole assemblage of a large acreage." (*Id.*) He told the jury:

> When we looked at this we saw our R-A zoning at the time as a holding zoning, that once the utilities were brought to the area that the property would be rezoned, and that's kind of the reason we went to talk to Mr. Rogers, to see could we do a rezoning eventually and could the usage of this property be like we had at Country Club Corporate Park just kiddy-corner across the street, and I remember after receiving a favorable response from Mr. Rogers towards this that as we left the room he kind of made a joke with us, saying, hey, if we needed any investors he would love to invest because he thought it was a great idea. (*Id.*)

Sosin also explained that this first meeting "was in 1989, late '88, early '89, something like that, with Mr. Rogers." (*Id.*) According to Sosin:

> We continued to—based on that encouragement, we continued to acquire some more of the parcels that we eventually ended up purchasing in that area, and throughout that time we had meetings with the Planning Department members and with Ed Kriewall with regards to where we were going with the development, we were keeping him apprised of what we were acquiring and how and what we were doing with the various parcels over there. (*Id.*)

Sosin described other high-tech office development in the area including the Nissan facility and the American Concrete Institute Headquarters. Contrary to MDOT's assertion, the record provides abundant support for these statements.

B. MDOT Urges This Court To Ignore The Jury View In Its Harmless Error Analysis Despite The Fact That The Jury Saw The Property And Was Instructed Without Objection To Consider What It Saw As Substantive Evidence.

MDOT never says that the jury did not see buildings that were consistent with office and high-tech development on or near the property during the jury view. This omission is not

surprising since MDOT is well aware of the state of the property at the time, a state readily ascertainable from public records. Instead, MDOT contends that the jury view should be ignored because the trial record does not describe (other than through statements of counsel) precisely what the jury saw. (MDOT Brief, pp 2-4). MDOT does not contest the notion that, in the area of eminent domain, a jury view is substantive evidence to be used in determining value. See generally, *In re Widening of Michigan Avenue*, 280 Mich 539, 547-548; 273 NW2d 798 (1937); *In re Memorial Hall, City of Detroit v Christy*, 316 Mich 215; 25 NW2d 174 (1946). Nor could it because the jury was instructed, without objection, that it could "consider what you saw when you visited the property if you believe the things you saw would be helpful to you in reaching a decision." (Tr, 4/9/01, p 145; Apx 491a quoting M Civ J I 90.22). Despite this substantive evidence which was indisputably considered by the jury, MDOT urges this Court to ignore it in any harmless error analysis. A jury view, like any evidence that is not testimonial, does not depend for its efficacy on a simultaneous description. See e.g., *Dep't of Transportation v Hsueh*, 454 NE2d 360 (Ill, 1983) (error in failing to strike testimony harmless where jury viewed premises and verdict was within the range of the testimony).

The jury's route was described by the court. (Tr, 3/30/01, p 139; Apx 181a). Testimony at trial made clear that the southern end of the property was developed at the time. (Tr, 4/5/01, p 235; Apx 398). The jury saw the developed portion of the property owner's land because it went from 12 Mile to the service route that cut through to 13 Mile and from there to the Haggerty Connector before going north to 14 Mile and back to Haggerty. (Tr, 3/3/01, p 139; Apx 181a; Tr, 4/5/01, p 235; Apx 398a). The record is sufficiently clear to demonstrate that the jury view included the southern end of the property, which was under development. MDOT tries to undercut the support for this by looking for a precise description of what the jury saw. In essence, this amounts to a request for the Court to ignore the effect of the jury view because it is

visual rather than testimonial evidence. Such a rule is contrary to Michigan's traditional approach of affording jury views significant weight as substantive evidence in the area of condemnation.

C. MDOT's Arguments Against The Admission Of Post-Taking Zoning Evidence Are Properly Rejected.

MDOT argues that evidence of a post-taking zoning change should have been excluded on the basis that it is not relevant, that the jury should not be permitted to confirm or refute the accuracy of either side's prediction by looking at post-taking zoning changes, that it was inadmissible in this case to the extent that it was attributable to MDOT's highway project, and that any probative value was outweighed by the danger of unfair prejudice. (MDOT Brief, pp 12-20).

In support of these arguments, MDOT relies on *State Highway Comm'r v Eilender*, 362 Mich 697, 699; 108 NW2d 755 (1961) for the rule that value is to be determined at the time of taking rather than at some future date. From this, MDOT concludes that only events that occurred before the date of the taking may be considered by the jury. But MDOT's conclusion does not follow from the premise.

The jury's job is to ascertain value on the date of taking in compliance with instructions from the court. The trial court instructed the jury:

> By "market value," we mean the highest price estimated in terms of money that the property would bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all of the uses and purposes to which it is adapted for which it is capable of being used, the amount which the property would bring if it were offered for sale by one who desired, but not obligated to sell, and was bought by one who is willing but not obligated to buy, what the property would bring in the hands of a prudent seller at liberty to fix the time and conditions of sale, what the property would sell for on negotiations resulting in [sic] sale between an owner willing, but not obligated to sell, and a buyer—and a willing buyer not obligated to buy, what the property would be reasonably worth on the market for a cash price, allowing a reasonable time within which to effect the sale. (Tr, 4/9/01, pp 138-139; Apx 489a).

The jury is not a surrogate market with each juror acting as a potential buyer or seller and knowing only what the buyer and seller knew on the date of taking. The jury determines just compensation artificially at trial because a property owner has been prevented from deciding on his or her own when to sell and for how much. The property owner is, in essence, forced by the government to sell in less than an arm's length transaction on a date not chosen by the owner. The goal of the trial is to find out what the property would otherwise have gone for. This necessarily involves a retrospective analysis. The jury, like the appraisers it hears from, has abundant information available that was not known on the date of the taking. And like the appraisers, the jury can and should consider this evidence where it is probative so that the amount of just compensation comes as close as possible to the amount that the property owner would have received in a market transaction.

MDOT supplies this Court with a hypothetical that is intended to illustrate its point that later knowledge cannot alter the price a willing buyer would have offered for the property just before the taking. (MDOT Brief, p 16). But MDOT's position is contrary to the Uniform Standards of Professional Appraisal Practice, which allow data that is subsequent to the effective date to be considered "as confirmation of trends that would reasonably be considered by a buyer or seller as of that date." (USPAP, Standard 3, The Appraisal Foundation, 9/16/98). MDOT does not dispute that retrospective analysis is contemplated under the standards of the professionals best situated to assist the jury to determine fair market value. (MDOT Brief, p 30). Instead, MDOT points out that the standards "expressly recognize that they are subservient to state law" and implicitly invites this Court to carve out a special rule, contrary to the nationally-adopted appraisal standards, to prohibit use of such evidence. (MDOT Brief, p 30). This invitation should be rejected since it would place Michigan outside the mainstream. It would require this Court to replace the standards adopted by both the federal government and many

states as the best way to assure professional, accurate, and uniform real estate appraisals with a rule of law that interferes with the neutral professionally-derived approach to valuation that has traditionally been used in Michigan and that is used for other real estate valuation.

MDOT points out that comparable sales are used to establish value with an adjustment for the passage of time and the date of taking. (MDOT Brief, p 27).[4] MDOT attempts to distinguish them by contending that comparable sales data has no predictive element. Thus, MDOT argues there is "no similarity between considering a post-taking comparable sale and a post-taking zoning." (MDOT Brief, p 27). But post-taking sales, like pre-taking sales, are used to predict the value the property would have had if sold in an arm's length transaction between a seller not forced to sell and a buyer willing to buy. Similarly, post- and pre-taking zoning is used to predict the value by establishing what the market would have deemed the highest and best use for the property, a major consideration in establishing value. Thus, these decisions are analogous and support a rule permitting the jury to consider appraisal evidence based on post-taking zoning evidence just as it is allowed to consider appraisal evidence based on post-taking sales data.

MDOT concedes that foreign jurisdictions allow post-taking zoning evidence to be used but argues that they are not persuasive. (MDOT Brief, pp 27-28). Of course, this Court is not bound by decisions from other jurisdictions. Nor is it bound by the view expressed in Nichols' treatise on eminent domain law—or by the approach embraced in the Uniform Standards of Professional Appraisal Practice. On the other hand, where respected scholars, government-adopted and professionally-adopted standards, and courts of many foreign jurisdictions all agree that the retrospective analysis of value should consider post-taking zoning evidence as long as it

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[4]MDOT itself introduced data regarding transactions not only after the date of taking but after the rezoning. (Tr, 4/6/01, Dloski, pp 111-112; Apx 439a; Tr, 4/6/01, Fuller, pp 124-127, 152-156; Apx 442a, 449a-450a).

is properly used, Michigan courts can and should be guided by this authority.

MDOT tries to distinguish the tax cases by suggesting that "courts and other highly trained tax specialists—not lay juries—determine valuation." (MDOT Brief, p 30). This attack on the jury system for eminent domain should be rejected. The jury provides an essential protection in our constitutional architecture, and one intended to ensure that condemning authorities do not abuse their power to take land but compensate the property owners justly. This Court recently described the important role of the jury, which is "grounded on the principle that the preservation of the jury by constitutional amendment was designed as a limitation on judicial power." *People v Lemmon*, 456 Mich 625, 639; 576 NW2d 129 (1998). This Court quoted then-Judge Taylor's observation that the "special role accorded jurors under our constitutional system of justice" has been acknowledged for centuries. *People v Bart (On Remand)*, 220 Mich App 1, 12; 558 NW2d 449 (1996). See also *Detroit v Gorno Steel Co*, 157 Mich App 294; 403 NW2d 538 (1987) (court declines invitation to "presume that government employees, teachers, housewives, secretaries and assembly workers, by the nature of their occupations, are incapable of rendering a proper verdict in a" valuation case.) Lay jurors are capable of evaluating the complexities of real property valuation just as they decide many other complex financial or accounting matters. And their role in doing so in condemnation proceedings provides an important constitutional protection.

MDOT also tries to distinguish the liquidated damages cases cited in the property owner's brief by asserting that these are equitable decisions and thus the Court is free to craft its own rules unrestrained by constitutional provisions. But this argument fails to address the point for which the decisions were cited. The liquidated damages decisions were cited, like the tax cases, and the eminent domain cases, to demonstrate the broad acceptance of retrospective analysis in valuation proceedings of all kinds. Retrospective analysis is used to ensure that the

most accurate valuation possible is determined. The property owner seeks fair market value—nothing more and nothing less. The trial court permitted use of evidence that was calculated to assist the jury in arriving at the most accurate determination of fair market value for this property.

D. THE TRIAL COURT'S DECISION TO ADMIT POST-TAKING ZONING EVIDENCE WAS CONSISTENT WITH *MDOT v VAN ELSLANDER*.

As MDOT concedes (MDOT's Brief, p 15), *Dep't of Transportation v Van Elslander*, 460 Mich 127; 594 NW2d 841 (1999) stands for the proposition that relevance is the threshold of admissibility. MDOT has also grudgingly conceded that the possibility of rezoning might be seen "as probative as to whether, in the recent past, there had been a 'reasonable possibility' of rezoning." (MDOT Brief, p 17). Having made these concessions, MDOT's position that post-taking zoning evidence should be categorically excluded, must be rejected.

MDOT's position is inconsistent with prevailing law because the possibility of rezoning not only "might be seen as probative," but must be seen as probative in many cases. The fact that something has occurred makes it more likely that it was, before it happened, a reasonable possibility. Likewise, if something has never occurred, it is less likely to have been a reasonable possibility. That being so, a post-taking zoning change satisfies the test for relevance. MDOT's real qualification was a temporal one. That is, MDOT acknowledges that a change in zoning that is close in time to the date of taking is probative as to whether that change was a reasonable possibility on the date of taking; but MDOT suggests that if the change is remote in time, it is not probative. Therefore, the question of whether to admit the appraisal evidence based on the 1998 zoning change rested within the trial court's exercise of discretion.

MDOT's real problem with the evidence of the 1998 zoning change at issue in this case is not that it lacks probative force, but that it is too probative. Consistent with that view, in

addition to arguing that the zoning change was too remote from the date of the taking, MDOT sought to exclude the evidence as prejudicial. (*Id.*) The trial court exercised its discretion to reject that argument:

> This Court finds that the evidence [of rezoning] offered by defendants' appraisers is relevant, it is not too remote in time, and that its value is more probative than prejudicial. MRE 402 and 403. This Court further finds that a factual dispute exists as to whether rezoning was a "reasonable possibility" at the time of the taking, along with other evidence to establish trends in the use of such property, such that this evidence must be submitted to the jury for a factual determination.

The preeminent treatise on the law of eminent domain makes it clear that the trial court's ruling was not an abuse of discretion:

> The fact that, subsequent to the taking, the zoning ordinance was actually amended to permit the previously proscribed use has been held to be weighty evidence of the existence (at the time of taking) of the fact that there was a reasonable probability of an imminent change. 4 Nichols, Law of Eminent Domain, § 12.322(2)

See also *Molbreak v Village of Shorewood Hills*, 66 Wis 2d 687; 225 NW2d 894, 903 (1975); *Texas Electric Service Co v M.L. Graves*, No. 6255, 1972 Tex App LEXIS 2946; 488 SW2d 135, 137 (1972).

MDOT also argues that the post-taking zoning evidence should have been excluded because the change was a project-related benefit which enhanced the value of the property owner's land. (MDOT Brief, pp 19-25). The trial court correctly rejected this argument at trial:

> Benefits which accrue to the land, remaining after a partial taking, cannot be considered so as to reduce the amount of damages unless expressly authorized by statute. State Highway Commissioner v. Sabo, 4 Mich. App. 291, 294 (1966). Enhancement in the value of the property has not been pled in the instant case as required by MCL 213.72(2). This Court further relies on SJI2d 90.19 to support its ruling that any evidence regarding benefits must be excluded. (Opinion and Order, 3/29/01).

MCL 213.73 requires a condemning authority to "set forth in the complaint the fact that enhancement benefits are claimed and describe the construction proposed to be made which will

create the enhancement." (*Id.*)

MDOT failed to do so. Its failure was a matter of trial strategy to ensure that the property owner could not compel MDOT to take the remainder of the tract. (See discussion in MDOT's brief to Michigan Court of Appeals, pp 29-30). MCL 213.70(3). MDOT chose to forego an enhanced benefits claim by failing to plead it as is required under MCL 213.73. Having done so, it is stuck with its choice. See e.g., *Jones v Porretta*, 428 Mich 132, 159; 405 NW2d 863 (1987) (court will not reverse on basis of issue not raised as matter of trial strategy). On appeal in this Court, MDOT seeks to circumvent the result of its strategic decision by raising a new argument, which is that MCL 213.73 only applies when enhanced benefits to the remainder are offset against the value of the parcel taken.[5]

Contrary to MDOT's argument, MCL 213.73(2) is not limited to remainders, but applies to all cases in which "enhancement in value is to be considered in determining compensation." *Id.* The statute establishes a blanket requirement that the condemning authority give notice that enhancement in value is to be considered by setting "forth in its complaint the fact that enhancement benefits are claimed." MCL 213.73(2). It also offers the property owner some protection against receiving reduced compensation and then not receiving the claimed benefits due to a change in plans by the condemning authority. These protections were not limited to those receiving compensation for a remainder parcel; they are intended to protect all property

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[5]MDOT concedes that it lacked statutory authority for that effort prior to the amendment to the statute. (MDOT Brief, pp 24-25, n 11 quoting MCL 213.70[2]). MDOT stated in its brief to the Court of Appeals:

> MDOT could have pled an enhanced remainder value—so that it would have paid less for the part taken—if it had: (1) determined that, on the date of taking, the possibility of rezoning was substantially increased because of the project, and (2) been willing to purchase the entire 335 acre parcel for the value that a jury in a condemnation case would ascribe to it, even though it only needed 51 acres. (MDOT Brief, p 30).

owners by requiring notice of the condemning authority's plan to consider enhancement in value and by ensuring that the claimed enhancement is fully realized.

Having failed to avail itself of this right to raise enhanced benefits by pleading it as required under the statute, MDOT now seeks to circumvent the statute by contending that it does not apply. MDOT's argument rests upon the dubious proposition that the disallowance of evidence because of its purportedly causing increased compensation based on the project itself somehow differs from the consideration of the enhancement of value. Both of these are different ways of saying the same thing, i.e., that just compensation may be less if the property's value has increased due to the project. MCL 213.70.

MDOT argues that the two statutory provisions must be read together; the property owner agrees. But MCL 213.70 and 213.73 can be harmonized by reading the procedural protections established in 213.73 to a claim that value has been increased due to the project. See generally, *G.C. Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) ("words in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole"). MDOT's reading does not harmonize the two provisions; it uses one to override the other. MDOT was required to plead that a claimed enhancement in value was to be considered by the jury in determining compensation. It failed to do so and thus, was properly precluded from presenting proofs to that effect at trial.

Nor does *In re Petition of State Highway Comm'n*, 383 Mich 709; 178 NW2d 923 (1970) support MDOT's argument. The decision involved condemnation under different statutes. Most significantly, it differed because the State Highway Commission's petition set forth its enhanced value claim in the complaint unlike MDOT's complaint, which did not. If anything, it supports the contention of the property owner that MDOT's failure to plead its request that the jury consider its claim of enhancement of value was properly held to bar its offer of evidence to that

effect at trial.

While it is not allowed to take away from the substantive constitutional right of just compensation, the state can legislatively broaden the protections to property owners. This has occurred with respect to navigational servitudes, 33 USC § 595a, relocation benefits for otherwise non-compensable losses, 42 USC § 4651. It also has occurred with respect to the rule allowing consideration of enhancement of value as a part of the just compensation process. This is permitted by statute, only when it is included in the offer and complaint. Under such circumstances, the statute provides the court, in its discretion, with the power to order a total take but only when the enhancement claim is properly noticed. MCL 213.73. Here, MDOT failed to follow the mechanisms required to prove any enhancement due to the project and thus, it was not entitled to present proofs on the subject.

In any event, the testimony at trial does not support MDOT's enhanced benefits theory. Fuller's opinion of the property's value took no account of the project because the property owner did not need the Haggerty Connector to be built where it was before an office park was feasible. The testimony about the likelihood of rezoning did not turn on the Haggerty Connector; it was based on Novi's desires for office high-tech development and the success of such developments in a neighboring community. The property owner presented the case "as though the acquisition had not been contemplated." MCL 213.70(1). Sosin explained at length that the property owner's desire to develop this property originated with the success of the real estate development kiddy-corner to the property, a development that was underway long before the Haggerty Connector project began. (Tr, 4/5/01, Sosin, pp 62-70; Apx 355a-357a). This earlier development did not require an expressway but was developed at the Haggerty Road/12 Mile intersection. (*Id.*) Had the Haggerty Connector project never taken place, Haggerty Road, like Telegraph Road, Hall Road, and other major county roads in southeastern Michigan would have

been likely to be a growth road.

E. In Any Event, MDOT Raises Issues That Are Outside The Scope Of This Court's Limited Leave Grant Order And That MDOT Has Specifically Waived.

Despite this Court's order explicitly limiting its grant of leave to specified issues that do not include any claimed error with respect to cost-to-cure, MDOT argues that the trial court erroneously allowed the property owner to seek cost-to-cure without employing appropriate methodology. (MDOT Brief, pp 4-5, 9-10, 32-37).[6]

The question whether an issue has been preserved for appellate review is, by definition, not one that was presented to the lower court. This Court determines for itself whether an issue has been adequately preserved. See *In re Contempt of Tanksley*, 243 Mich App 123, 125; 621 NW2d 229 (2000); *Oliver v Dep't of State Police*, 132 Mich App 558, 572-573; 349 NW2d 211 (1984). MDOT concedes that, although it raised the cost-to-cure issue in a motion in limine on March 7, three weeks before trial, "no order was entered by the trial court denying MDOT's motion." (MDOT Brief, p 35). MDOT insists that the trial court "apparently misspoke, or the court reporter erroneously transcribed that 'Defendants' motion is denied.'" (MDOT Brief, p 34). MDOT asserts that the "obvious intent" was to deny MDOT's motion. (*Id.*) But, as MDOT well-knows, the property owner had filed a motion seeking to exclude MDOT's expert's cost-to-cure report. The transcript is consistent with the order referenced by the trial court, which denied

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[6]MDOT employs pejorative language to describe the property owner's brief calling its discussion of Fuller's testimony as "mere obfuscation." (MDOT Brief, p 4). But MDOT misreads the brief. The property owner is not, as MDOT apparently thinks, discussing the cost-to-cure issue at all. The property owner is pointing out that Fuller reduced the price to take into account the uncertainties inherent in a purchase of property for office development when the parcel was not yet zoned to allow it. (Haggerty Corridor Brief, p 11). This point was discussed as part of the property owner's analysis of the proper use of post-taking zoning evidence. It was not discussed to shed light on any cost-to-cure issue because this Court did not grant leave on that issue presumably because MDOT abandoned it when it failed to raise it during trial and failed to move for judgment notwithstanding the verdict.

the property owner's motion in limine to exclude the AEW cost-to-cure report and the testimony based on that report. (Opinion and Order, 3/28/01).

Review of the record reveals that MDOT missed every opportunity to press its argument, and so failed to preserve the issue for appellate review. The record reflects no clear decision of the motion in limine. MDOT did not renew its argument when Fuller took the stand (Tr, 4/6/01, Fuller, p 36; Apx 420a), or when he began to testify concerning the cost-to-cure issue in general (*Id.*, p 78; Apx 431a), or when he testified to the "as is" market value of the remainder parcel. (*Id.*, pp 84-90; Apx 432a-433a). Even on cross-examination, MDOT's questions in this area merely quarreled with Fuller's conclusions, tacitly acknowledging that the issue was for the jury to decide. (*Id.*, pp 144-145, 159-161; Apx 447a-448a).

During the conference on jury instructions, MDOT not only failed to protest the giving of a cost-to-cure instruction, MDOT actually proposed a jury instruction that gave the jury discretion to award cost-to-cure damages. (Tr, 4/9/01, pp 142-143; Apx 490a). During the instruction conference, MDOT's counsel told the court that he did not object to any aspect of this instruction except the part about mitigating damages by acquiring other property. (Tr, 4/9/01, p 22; Apx 460a). At one point, counsel for MDOT told the court, "You understand, my objection is the cost to cure for something that's not been developed." (Tr, 4/5/01, p 187; Apx 386a). One would expect, from a reading of MDOT's brief to this Court, that MDOT's counsel would have urged the jury to award no cost-to-cure damages because the property owner failed to introduce evidence of the remainder's "as is" value after the taking. But no such argument was made. (Tr, 4/9/01, pp 66-74; Apx 471a-473a). Instead, counsel argued that (1) "you never get to these OST costs to cure unless you conclude . . . that there was a reasonable possibility of rezoning on December 7th of 1995" (*Id.*, p 66; Apx 471a); (2) that the plans for development were "hypothetical" (*Id.*, p 69; Apx 472a); and (3) that some of the cost-to-cure claimed by the

property owner were excessive. (*Id.*, pp 67-68, 72, 123; Apx 471a, 472a, 485a). MDOT's argument to this Court is essentially that the evidence was insufficient as a matter of law to permit the jury to consider the cost-to-cure issue. But MDOT failed to preserve its insufficient-evidence argument when it failed to move for a judgment notwithstanding the verdict.

MDOT tacitly acknowledges the preservation issue, but urges this Court to consider the issue anyway, citing *Blackwell v Citizens Ins Co of America*, 457 Mich 662, 673-674; 579 NW2d 889 (1998), for the proposition that "this Court may consider issues that were not even raised at trial." (MDOT Brief, p 35). But this case does not begin to qualify for the exception. To paraphrase Michigan's leading case on the issue, "[t]he alleged insufficiency [of the cost-to-cure evidence] was not manifest enough for [MDOT] to make it an issue at trial, and no extraordinary basis for exploring it on appeal has been advanced." *Napier v Jacobs*, 429 Mich 222, 235; 414 NW2d 862 (1987). Like *Napier* itself, the present case concerns only a money judgment, which does not suffice to establish manifest injustice. *Id.* at 233-234. Any different rule "would, in effect, impose a duty in every civil case on the trial judge to review sua sponte the sufficiency of the evidence and to grant unrequested verdicts." *Id.* at 234.

The property owner's appraiser, James Fuller, determined that the property—a large assemblage of land with strong office park development potential—had a market value before the taking of $57.3 million, or about $180,000 per acre. (Tr, 4/6/01, Fuller, pp 41, 71, 80; Apx 422a, 429a, 431a). Using the same valuation, the 51.26 acres taken by MDOT were worth about $9.23 million. (Tr, 4/9/01, p 14; Apx 458a). Because of MDOT's project, however, the property owner's remainder was worth less than $48 million (the whole minus the part taken). Thomas Biehl, a civil engineer and the executive vice president of an engineering firm known as Hubbell, Roth and Clark, testified at length about why this was so, and about what it would cost-to-cure the taking-related problems. (Tr, 4/5/01, pp 174-229; Apx 383a-396a). Biehl also testified that

these problems involved features that were required by law for any feasible development of the property. The taking-related changes—the elevation of 13 Mile Road, the taking of the high ground, the additional storm water drainage off the Haggerty Connector, the forced changes to interior collector roads—made these necessary features of any development $6.87 million more expensive for the property owner (or anyone) in the "after" than they would have been in the "before" scenario.

Fuller factored in this evidence of required changes in arriving at the price he believed a buyer would pay for the remainder after the taking. But he did not merely subtract the cures ($6.87 million) from the remainder's "before" value. He testified that a buyer would have paid even less for the remainder because of concerns that necessary development costs after the taking might be higher still. Fuller subtracted another $2.49 million for this uncertainty, concluding initially that the remainder's "as is" value was $40.47 million. (Tr, 4/6/01, Fuller, p 88; Apx 433a). The cost of bringing sewer and water to the property still had to be deducted from this number, making the net "after" value of the remainder about $38.7 million. The entire point of Fuller's testimony was to make the best possible estimate of the highest price a willing, rational and knowledgeable buyer would pay after the taking for the remainder property in its undeveloped state, intending to develop it for its highest and best use as an office park.

For the property owner to realize the property's highest and best use, these legal requirements were an essential part of the equation. Fuller testified that no commercial development was possible without these repairs. (Tr, 4/6/01, pp 157-158; Apx 451a). There is no dispute that Novi's ordinances required collector roads. (Tr, 4/5/01, Biehl, pp 143-144; Apx 447a). MDOT's own expert (Roy Rose) agreed about this. (Tr, 4/3/01, Rose, p 94; Apx p 280a). He also agreed that the north and south roads should be aligned at 13 Mile Road: "You would prefer to have them lined up, either have them lined up or you have them set off by a certain

stagger [800 feet] so that left-hand turners don't run into one another." (*Id.*, p 101; Apx 480a). Similarly, there were legal requirements for mucking and filling as well as wetland mitigation. (Tr, 4/5/01, Biehl, pp 119-120, 208-209; Apx 369a, 391a-392a). The land balancing costs were also traceable to Novi ordinances, because the land had to be balanced in a way that did not run afoul of Novi's woodland ordinances. (*Id.*, pp 208-209, 212; Apx 391a-392a). In short, the property owner could not have developed the property at all, much less at its highest and best use, absent compliance with these legal requirements. As with any project, if it is not legal, it is not buildable.

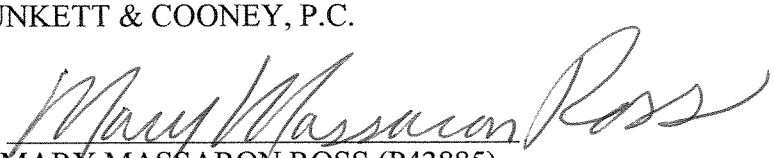
Fuller testified that he subtracted the cost-to-cure damages and a contingency amount from the remainder's "before" value to arrive at an after-take "as is" value and MDOT has provided no legal authority suggesting that Fuller's approach is not legally permissible.

RELIEF

WHEREFORE, Defendants-Appellants respectfully request that this Court reverse the Court of Appeals and reinstate the lower court judgment in favor of Haggerty Corridor Partners Limited Partnership, Paul D. Yager, Trustee a/k/a Paul D. Yeger and Neil J. Sosin and grant them such other relief as is warranted in law and equity.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

BY: 

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